Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,

Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,

Appellees.

On Appeal From The Supreme Court Of Alabama

BRIEF OF APPELLANT

Of Counsel:

PETER V. SINTZ
WM. M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Conn. Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on one class of unsuccessful defendant-appellants, but which imposes no corresponding burden on other defendant-appellants or on unsuccessful plaintiff-appellants, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether appellant's right to a fair, unbiased hearing of its appeal below, guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, was denied because of the participation in the consideration and decision of this case, an action seeking punitive damages for alleged bad faith failure to pay an insurance claim, by a Justice of the Supreme Court of Alabama who, while this case was *sub judice* in the Supreme Court of Alabama and without notice to the parties to this case, filed and continued to prosecute a civil class action against an insurer seeking punitive damages for alleged bad faith failure to pay insurance claims, where several issues raised in and central to that class action would have been predictably controlled or substantially affected by rulings of law rendered by the Supreme Court of Alabama in its judgment and opinion issued in this case.

3. Whether the subjection of appellant to liability for punitive damages for bad faith failure to pay an insurance claim with respect to a contract executed in 1967 and performed in 1977 and 1978 violates the Contract Clause, Art. I, § 10, cl. 1 of the Constitution of the United States, because it imposes retrospectively a new, unanticipated and severe obligation on that contract in the form of a cause of action for bad faith failure to pay an insurance claim, accompanied by exposure to virtually unlimited punitive damages, which obligation was not recognized by the State of Alabama until 1981.

4. Whether the award of $3,500,000 in punitive damages against appellant for failure to pay a $1,650.22 insurance claim

is violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, because it is vastly out of proportion to actual damages, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States because it was imposed pursuant to a non-statutory cause of action under which no limitations are placed on such punitive damage awards, because the payment of this award to appellees is a windfall and advances no legitimate state purpose, and because it was imposed as a punishment without adequate notice to appellant of the substantive rules governing such conduct.*

All parties to this case are named in the caption. The parent and subsidiaries of Aetna Life Insurance Company are as listed in the Jurisdictional Statement in this case, at p. ii. On April 10, 1985 the court below granted appellant's second motion to correct the caption in the case to show Aetna Life Insurance Co. as the appellant-defendant in this case vice Aetna Life & Casualty Co.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE ALL FOUR OF THE QUESTIONS PRESENTED	10
A. The Appellate Question	12
B. The Disqualification Question	13
C. The Contract Clause and Excessive Fines Clause Questions	14
II. SECTION 12-22-72, *CODE OF ALABAMA* (1975), ON ITS FACE AND AS APPLIED, VIOLATES THE EQUAL PROTECTION CLAUSE	18
A. Section 12-22-72 Violates the Equal Protection Clause Under Any Standard of Review	18
B. Section 12-22-72 Places a Substantial and Unequal Burden on a Class of Appellants	18
C. The Unequal Burden on the Right to Appeal Imposed by § 12-22-72 Is Irrational, Arbitrary and Unconnected to Any Legitimate State Interest	19
III. THE PARTICIPATION OF JUSTICE EMBRY IN THE CONSIDERATION AND DECISION OF THIS CASE VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR HEARING OF ITS APPEAL	21
A. Justice Embry's Direct, Personal Interest in the Outcome of This Case Violated Appellant's Rights Under the Due Process Clause	22

Table of Contents Continued

Page

B. Justice Embry, By His Participation in This Case Below, Effectively Was Sitting as Judge in His Own Cause in Violation of the Due Process Clause 25

C. Justice Embry's Conduct Constitutes Actual Bias in Violation of Appellant's Rights Under the Due Process Clause 26

IV. THE RETROSPECTIVE IMPOSITION OF PUNITIVE DAMAGES UNDER A NEW CAUSE OF ACTION VIOLATES APPELLANT'S RIGHTS UNDER THE CONTRACT CLAUSE . 28

A. The Contract Clause Should Be Applied to Judicial Action Which Is Essentially Legislative in Character 30

B. The Bad Faith Action Created in 1981 By the Supreme Court of Alabama Imposes, Retrospectively, an Unconstitutional Obligation on the Insurance Contract in This Case 36

V. THE $3,500,000 PUNITIVE DAMAGE AWARD VIOLATES APPELLANT'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 38

A. The Excessive Fines Clause of the Eighth Amendment Should Be Held To Apply to Punitive Damage Awards in Civil Cases 39

1. *The relevant history of the Excessive Fines Clause and its English antecedents requires the application of that Clause to punitive damage awards in civil actions* 40

2. *The $3,500,000 punitive damage award in this case is excessive* 44

B. The $3,500,000 Punitive Damage Award Violates Appellant's Rights Under the Due Process Clause 46

CONCLUSION 50

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: Page

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 36, 37

American Pioneer Life Insurance Co. v. *Sandlin*, No. 82-1603, slip op. (Ala. Apr. 12, 1985) 48

Baltimore & Ohio Railroad Co. v. *Baugh*, 149 U.S. 368 (1893) 33

Barr v. *City of Columbia*, 378 U.S. 146 (1964) 13

Berger v. *United States*, 255 U.S. 22 (1921) 27

Berryhill v. *Gibson*, 331 F. Supp. 122 (M.D. Ala. 1971) 24

Black & White Taxicab Co. v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928) 33

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U.S. 673 (1930) 15

Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 16

Central of Georgia Railway Co. v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971) 12

City of Birmingham v. *Bowen*, 254 Ala 41, 47 So.2d 174 (1950) 20

City of Cleburne v. *Cleburne Living Center*, No. 84-468, slip op., 53 U.S.L.W. 5022 (July 1, 1985) 18, 19

Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 393 U.S. 145 (1968) 27

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) . 1

Crowell v. *Randell*, 35 U.S. (10 Pet.) 240 (1836) 11

Dewey v. *Des Moines*, 173 U.S. 193 (1899) 16

Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, No. 83-13, slip op., 53 U.S.L.W. 4866 (June 26, 1985) 10, 48, 49

Earl of Derby's Case, 77 Eng. Rep. 1390 (K.B. 1614) . 25

Electrical Workers v. *Foust*, 442 U.S. 42 (1979) 46, 47

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) 33, 34, 35

Ex parte Alabama Power Co., 280 Ala. 586, 196 So.2d 702 (1967) 25

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 44

Table of Authorities Continued

	Page
Gibson v. *Berryhill*, 411 U.S. 564 (1973)	24, 26
Gulf Atlantic Life Insurance Co. v. *Barnes*, 405 So.2d 916 (Ala. 1981)	4, 15
Illinois v. *Gates*, 462 U.S. 213 (1983)	11, 16, 17
In re Gault, 387 U.S. 1 (1967)	40
In re Murchison, 349 U.S. 133 (1955)	8, 22, 24
Ingraham v. *Wright*, 430 U.S. 651 (1977)	9, 32, 40, 46
Inland Steel Co. v. *NLRB*, 109 F.2d 9 (7th Cir. 1940)	28
Lavoie v. *Aetna Life and Casualty Co.*, 374 So.2d 310 (Ala. 1979)	1, 3
Lavoie v. *Aetna Life and Casualty Co.*, 405 So.2d 17 (Ala. 1981)	1, 3
Lawrence v. *Jones*, 37 Ala. 388 (1861)	12
Le Gras v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl.4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934)	43
Lemon v. *Kurtzman*, 411 U.S. 192 (1973)	35
Lindsey v. *Normet*, 405 U.S. 56 (1972)	8, 19, 21
Los Angeles Dept. of Water & Power v. *Manhart*, 435 U.S. 702 (1978)	37
Middletown National Bank v. *Toledo, A.A. & N.M.R.R.*, 105 F. 547 (C.C.S.D.N.Y. 1900)	26
National Savings Life Insurance Co. v. *Dutton*, 419 So.2d 1357 (Ala. 1982)	4
National Security Fire & Casualty Co. v. *Bowen*, 417 So.2d 179 (Ala. 1982)	4
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	35
Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, ____U.S. ____, 104 S. Ct. 2079 (1984)	48
Prentis v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908)	31
RMP, Inc. v. *Arledge*, 417 So.2d 158 (Ala. 1982)	20
Saunders v. *Shaw*, 244 U.S. 317 (1917)	15

Table of Authorities Continued

	Page
Scott v. *Donald*, 165 U.S. 58 (1897)	46
Sedima, S.P.R.L. v. *Imrex Co.*, Nos. 84-648 & 84-822, slip op., 53 U.S.L.W. 5034 (July 1, 1985)	45
Sexton v. *Liberty National Life Insurance Co.*, 405 So.2d 18 (Ala. 1981)	4
Schick v. *United States*, 195 U.S. 65 (1904)	32
Smith v. *Wade*, 461 U.S. 30 (1983)	44, 47, 48, 49
Snellings v. *Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934)	19
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 (1942)	32
Solem v. *Helm*, 463 U.S. 277 (1983)	40, 41, 42, 43, 44
Stockholders of the Peoples Banking Co. v. *Sterling*, 300 U.S. 175 (1937)	30
Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842)	33
Terminiello v. *Chicago*, 337 U.S. 1 (1949)	11
Tidal Oil Co. v. *Flanagan*, 263 U.S. 444 (1924)	30
Trop v. *Dulles*, 356 U.S. 86 (1958)	39, 40
Tumey v. *Ohio*, 273 U.S. 510 (1927)	24
United States v. *Darusmont*, 449 U.S. 292 (1981)	49
United States v. *Lovett*, 328 U.S. 303 (1946)	39
United States v. *Ward*, 448 U.S. 242 (1980)	49
United States Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973)	20
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	36
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	49
Vachon v. *New Hampshire*, 414 U.S. 478 (1974)	11
W.B. Worthen Co. v. *Kavanaugh*, 295 U.S. 56 (1935)	36, 38
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972)	24
Webb v. *Webb*, 451 U.S. 493 (1981)	16, 17
Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265 (1888)	34
Wright v. *Crump*, 87 Eng. Rep. 1055 (Q.B. 1702)	25

Table of Authorities Continued

Page

CONSTITUTION, STATUTES AND RULES:

UNITED STATES CONSTITUTION:

Art. I, Section 10, Clause 1 (Bill of Attainder Clause) 36, 39

Art. I, Section 10, Clause 1 (Ex Post Facto Clause) . 36

Art. I, Section 10, Clause 1 (Contract Clause) ... *passim*

Art. III, Section 2 11

Art. VI, Clause 2 (Supremacy Clause) 32, 35

First Amendment 35

Fifth Amendment (Self-incrimination Clause) 41

Eighth Amendment (Excessive Fines Clause) ... *passim*

Eighth Amendment (Cruel and Unusual Punishments Clause) 10, 39, 40

Fourteenth Amendment, Section 1 (Equal Protection Clause) 12, 19

Fourteenth Amendment, Section 1 (Due Process Clause) ..... *passim*

FEDERAL STATUTES:

Judiciary Act of 1789, Ch. XX, Section 25, 1 Stat. 73, 85 11

Judiciary Act of 1789, Ch. XX, Section 34, 1 Stat. 73, 92 (*codified at* 28 U.S.C. § 1652) 33, 35

Ordinance of 1787: The Northwest Territorial Government, 44 Stat. 1851 (pt. 1), Section 4 31

Ordinance of 1787: The Northwest Territorial Government, 44 Stat. 1851, 1852 (pt. 1), Art. II 31

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sections 1961-68 45

28 U.S.C. Section 1257(2) 1, 11, 14

28 U.S.C. Section 1257(3) 11, 14

Table of Authorities Continued

Page

ALABAMA STATUTES AND RULES:

Section 8-8-10, *Code of Alabama* (1975) 21
Section 12-22-72, *Code of Alabama* (1975) ..... *passim*
Section 13A-4-3, *Code of Alabama* (1975) 45
Section 13A-5-12, *Code of Alabama* (1975) 45
Section 13A-9-41, *Code of Alabama* (1975) 45
Section 27-1-17, *Code of Alabama* (1975) 1, 28, 29, 38, 44, 45
Rule 20, Ala. R. App. P. 12
Rule 37, Ala. R. App. P. 21
Rule 38, Ala. R. App. P. 19, 20

MISCELLANEOUS:

1 S.D. Codified Laws (1978) 41
Virginia Declaration of Rights, Art. 1, Section 9 (1776) 43
1 Wm. & Mary, Sess. 2, Ch.2 (1689) 43

CONGRESSIONAL MATERIALS:

1 Annals of Cong. (Gales & Seaton eds. 1834) 41

TREATISES AND LAW REVIEW ARTICLES:

1 W. Blackstone, *Commentaries on the Laws of England* (1765) 32
3 W. Blackstone, *Commentaries on the Laws of England* (1768) 43, 44
2 M. Farrand, *The Records of the Federal Convention of 1787* (1911) 31, 32, 36
C. McCormick, *Law of Damages* (1935) 47
Morrison, *Punitive Damages and Why the Reinsurer Cares*, XX *The Forum* 73 (ABA Fall 1984) 23
2 F. Pollock & F. Maitland, *The History of English Law* (2d ed. 1909) 42, 45

Table of Authorities Continued

Page

Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1924) 34

B. Wright, *The Contract Clause of the Constitution* (1938) 31

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of December 7, 1984 is reproduced in Appendix A of the Appendix to the Jurisdictional Statement (J.S. App. 1a-63a) and is unofficially reported in 19 Ala. Bar. Rep. 272. The March 8 and March 25, 1985 orders and opinions of the court below are reproduced in J.S. App. 64a-73a and J.S. App. 74a-75a, respectively. The Circuit Court of Mobile County issued no opinion. The prior opinions of the court below in this case are reported *sub nom. Lavoie* v. *Aetna Life and Casualty Co.*, 374 So.2d 310 (Ala. 1979), and 405 So.2d 17 (Ala. 1981). On June 3, 1985 this Court ordered argument of this case, with further consideration of the question of jurisdiction postponed to the hearing on the merits.

JURISDICTION

The appellate jurisdiction of this Court under 28 U.S.C. § 1257(2) is invoked because the December 7, 1984 decision and March 8, 1985 order overruling appellant's Application for Rehearing necessarily upheld the constitutionality of § 12-22-72, *Code of Alabama* (1975), against appellant's federal constitutional challenge to that statute, presented to this Court as Question 1. Questions 2, 3 and 4 were duly presented to the court below and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487 n.14 (1975). This appeal was docketed on April 9, 1985, within the ninety-day period for docketing appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and §§ 12-22-72 and 27-1-17, *Code of Alabama* (1975), are as set forth in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT OF THE CASE

Appellant, Aetna Life Insurance Company, has been found to have breached a contractual obligation to pay $1,650.22 in benefits under a group health insurance policy. Based upon a theory of tortious liability for bad faith refusal to pay insurance benefits, which did not exist in Alabama when (and where) the contract was executed and performed, $3,500,000 has been added to that contractual liability as punitive damages. Another $350,165 has been awarded to appellees pursuant to an Alabama statute which imposes an automatic ten percent penalty upon litigants who unsuccessfully appeal money judgments. Appellant must also pay interest on the total sum and costs on appeal. The opinion of the Supreme Court of Alabama which affirmed and imposed these awards by a five-to-four vote was authored by a Justice who, without disclosure to the litigants, had filed two "bad faith" cases against insurance companies, one of which was filed on behalf of a class of Alabama public employees, including his colleagues on that court, and which was pending during most of the time his court had this case *sub judice*.

On February 1, 1967 a contract went into effect between appellant and the City of Mobile which provided for a group policy of insurance to cover employees of the City of Mobile and their dependents (J.A. 34-48). At that time and for more than fourteen years thereafter, neither the statutory nor common law of Alabama recognized an action in tort for punitive or any other form of damages for "bad faith" failure to pay insurance claims.

On February 3, 1977 appellee Margaret W. Lavoie, the dependent of an insured under the contract between appellant and the City of Mobile, was admitted to the Mobile Infirmary Hospital, from which she was discharged twenty-three days later with a discharge diagnosis of "osteoarthritis, mild psychophysiologic reaction manifested by abdominal pain." On June 3, 1977 appellant made payments of $1,579.74 under its policy,

but declined to pay the balance of the claim, $1,650.22. (J.S. App. 2a-3a, 4a, 6a).

Appellant's declination to pay the remaining portion of the claim was based on its position (later rejected by the trial court) that certain tests were "not usual and customary procedures for the diagnosis given" and that the tests for which appellant had made payment could have been administered on an outpatient basis. (J.S. App. 6a). Thus, appellant's refusal was based on its assessment of its contractual obligations under which it had no duty to pay for "care, treatment, services or supplies which are not necessary for the treatment of the . . . disease concerned." (J.S. App. 11a; J.A. 40). Appellant subsequently reiterated its decision not to pay the $1,650.22 claim. (J.S. App. 8a-10a).

On September 29, 1978 appellees filed a civil action against appellant seeking $1,650.22 in contract damages and punitive damages. (J.A. 3). Since Alabama had not previously recognized the possibility of recovery in tort for the "bad faith" failure to pay an insurance claim, the trial court, on November 17, 1978, dismissed with prejudice appellees' four causes of action seeking punitive damages for failure to state a claim for which relief could be granted. (J.A. 3). On August 31, 1979 the Supreme Court of Alabama reversed the trial court and remanded the case, stating that it had "not foreclosed the possibility" of recovery under a "bad faith" theory. *Lavoie* v. *Aetna Life and Casualty Co.*, 374 So.2d 310, 312 (Ala. 1979).

After a period of discovery, on October 10, 1980 the trial court granted appellant's motion for summary judgment on the four causes of action for punitive damages. (J.A. 3). On October 2, 1981 the court below once again reversed the trial court and remanded the case "in . . . light of" its "recent [the same day] decision . . . recogniz[ing] the intentional tort of bad faith in first party insurance actions." *Lavoie* v. *Aetna Life and Casualty Co.*, 405 So.2d 17, 18 (Ala. 1981). That same day, the court below for the first time determined that punitive damages would be recoverable in this newly recognized tort.

Gulf Atlantic Life Insurance Co. v. *Barnes*, 405 So.2d 916, 925 (Ala. 1981). Also on October 2, 1981 the court below determined that partial payment of a claim, as occurred in the case at bar, would generally preclude liability for bad faith refusal to pay an insurance claim. *Sexton* v. *Liberty National Life Insurance Co.*, 405 So.2d 18, 22 (Ala. 1981).

This case subsequently went to trial on November 1, 1982 based on a fourth amended complaint. (J.A. 4). In the interim, the Supreme Court of Alabama had issued a decision holding that, as a general rule, a bad faith action would not be recognized unless the plaintiff were "entitled to recover on the contract claim *as a matter of law*," *National Savings Life Insurance Co.* v. *Dutton*, 419 So.2d 1357, 1362 (Ala. 1982) (emphasis added), and had reaffirmed the rule it had established in *Sexton* regarding partial payment. *National Security Fire & Casualty Co.* v. *Bowen*, 417 So.2d 179, 186 (Ala. 1982).

On November 4, 1982 the jury returned a verdict for the appellees in the sum of $3,501,650.22 (J.A. 4), $3,500,000 of which was assessed by the jury as punitive damages and $1,650.22 of which was awarded on the contract claim.

On September 8, 1983 appellant filed its opening brief in the court below. On November 17, 1983 the "Maddox Division" of the court below denied oral argument and the case was submitted to that Division. (J.A. 1).

On November 23, 1983 Justice Embry of the court below gave notice to the Maryland Casualty Company ("Maryland Casualty") of the loss of a valuable mink coat. On January 19 1984 Justice Embry filed a bad faith action against Maryland Casualty in the Circuit Court for Jefferson County, Alabama, alleging that Maryland Casualty "in bad faith, willfully, intentionally, and/or maliciously failed to pay a valid claim" and praying for "punitive damages." (J.S. App. 90a-91a).

On January 30, 1984 Justice Embry filed another bad faith action in that same Circuit Court on behalf of himself and as a representative of a class of all other Alabama state employees

insured under a group plan by Blue Cross-Blue Shield of Alabama ("Blue Cross") alleging, *inter alia*, a failure by Blue Cross to pay in full various claims filed for him and his late wife, a custom of paying in claims only a portion of the actual charges, unreasonable delay in paying claims, and a "conscious, willful and intentional and fraudulent plan or scheme [to withhold] payment of valid claims for unreasonable lengths of time and in so doing, unlawfully [to enrich] itself." (J.S. App. 98a). The complaint alleged bad faith and sought "punitive damages for defendant's bad faith breach of contract" for Justice Embry and other members of the class. (J.S. App. 102a).

On April 4, 1984 the full court below *sua sponte* set aside the order of November 17, 1983 denying oral argument and ordered this case to be argued and submitted to the full court. (J.A. 1). On April 16, 1984 Justice Embry's bad faith action against Maryland Casualty was settled. (J.S. App. 85a). On May 14, 1984 this case was argued and submitted to the full court below. (J.A. 1).

Within several months after he brought his bad faith class action against Blue Cross, and extending for an eight-to-nine month period, Justice Embry engaged in drafting what was, at that time, a dissenting opinion in which he would have affirmed the judgment of the trial court in this case. (J.S. App. 167a-169a). During this same period, Justice Embry was also receiving "leads" from people with regard to his own bad faith action against Blue Cross, people he then put in touch with his attorney. (J.S. App. 206a-207a). Indeed, during this period Justice Embry was, in his own words, contacted by "[n]umerous [people who] have read about [his] lawsuit and read some of the details and said that is typical of the way [they] have been treated." (J.S. App. 228a).

Sometime in November or early December of 1984, Justice Embry's dissenting opinion became the majority opinion in this case. (J.S. App. 168a-169a). On December 7, 1984 that newly prevailing opinion was handed down as a *per curiam*, unsigned opinion joined by four other Justices and Justice Embry. In

that opinion, the court below determined that "blind adherence to a directed verdict standard . . . . simply cannot be the law," (J.S. App. 29a), and rejected the proposition that "a partial payment of an insurance claim establishes an absolute defense to a bad faith refusal to pay action." (J.S. App. 32a).

On December 21, 1984 appellant filed a timely Application for Rehearing in the court below and on December 28, 1984 appellant timely filed its brief in connection with that application (J.S. App. 77a-84a), having been granted a seven-day extension of time in which to file that brief. (J.A. 1).

On January 10, 1985 Justice Embry was deposed in his case against Blue Cross. Admitting that the appellant's case was on rehearing before his court (J.S. App. 167a), Justice Embry nevertheless responded to questions directly related to his court's handling of, and deliberations regarding, appellant's case. In addition to the facts summarized above regarding his successful draftsmanship of the *per curiam* opinion and his simultaneous, active involvement in the prosecution of his Blue Cross case, Justice Embry laid on the public record his deep-seated hostility towards insurance companies based on his personal experiences over many years with alleged non-payment, partial payment and late payment of health insurance claims. (J.S. App. 166a, 173a).

On February 14, 1985 appellant first learned of Justice Embry's Blue Cross case. On February 21,1985 appellant filed two motions in the court below raising its federal constitutional challenge to Justice Embry's participation in the December 7, 1984 decision below and to his continued participation in the disposition of its Application for Rehearing. (J.S. App. 85a). On March 8, 1985 Justice Embry participated in the unanimous denial of appellant's motions related to his own disqualification and in the overruling by the court, on a five-to-four vote, of appellant's Application for Rehearing. (J.S. App. 64a, 65a).

On March 20, 1985 — five days before the mandate of the court below was to issue — appellant finally received, after strenuous efforts of its counsel (J.S. App. 133a, 137a-139a,

142a-144a), a copy of the official transcript of Justice Embry's January 10, 1985 deposition. On March 22, appellant laid this transcript before the court below and renewed all of its prior challenges to the judgment and Justice Embry's participation. (J.S. App. 132a *et seq.*).

At the same time, appellant filed a motion for a stay of the execution of judgment pending the timely docketing of an appeal in this Court. On March 25, 1985 the court below, with Justice Jones not participating, unanimously denied both of appellant's motions. (J.S. App. 74a-75a). Justice Powell subsequently granted a stay of the mandate.

SUMMARY OF ARGUMENT

I

Appellate jurisdiction over this case exists because appellant presented its constitutional challenge to § 12-22-72 in a manner completely consistent with an unbroken line of seventeen cases dating from 1861 decided by the court below under which constitutional and statutory issues regarding § 12-22-72 or its predecessors have been presented for the first time and decided after entry of the decision of the court below.

Appellant's constitutional challenge to the fairness of the hearing below was timely because it was presented and pursued as soon as the previously undisclosed and completely unanticipated basis for that challenge was discovered. Each of the Justices below participated individually and collectively in rejecting the Due Process Clause claim.

The timeliness of appellant's challenges to the judgment below under the Contract, Excessive Fines and Due Process Clauses, which were presented for the first time in its efforts to obtain a rehearing, is fully justified for purposes of this Court's deciding those challenges because the court below has no rule or practice precluding the raising of such challenges for the first time after entry of its decision in a case. Furthermore, appellant could not reasonably have anticipated that the court below would chart completely new legal territory and approve

previously unthinkable, unprecedented and disproportionate punitive damages. Nor could appellant have suspected that the vital legal issues presented in its case would be resolved by a Justice with not only a direct and personal stake in the outcome of those issues but also strong hostilities towards insurers. Finally, prudential considerations militate strongly in favor of the Court's deciding these substantial challenges to the $3,500,000 punitive damage award.

II

The unconstitutionality of § 12-22-72 is manifest under this Court's decided cases, particularly *Lindsey* v. *Normet*, 405 U.S. 56 (1972), because it erects an intolerable barrier to access to the justice system to one class of litigants of which appellant is a member, while imposing no comparable burden on other classes of litigants. The severe appeal penalty serves no legitimate end. It penalizes indiscriminantly the diligent and the dilatory, the serious and the frivolous, while allowing whole classes of unworthy appeals to proceed uninhibited.

III

The participation in the deliberation and the authorship of the court's *per curiam* opinion in this case by a Justice who was simultaneously prosecuting his own "bad faith" class action in an Alabama trial court raising legal issues identical to those decided by the *per curiam* opinion violated all tenets set forth in *In re Murchison*, 349 U.S. 133 (1955), as basic requirements of due process. By his actions, this Justice participated intimately and decisively in the resolution of issues in which he had direct pecuniary and fiduciary interests. By his actions, he effectively decided issues raised in his own litigation, thereby acting contrary to any plausible interpretation of the Due Process Clause. And by his own words, spoken under oath, this Justice displayed personal bias sufficient to disqualify him from participation in this case.

Six other Justices of the court below, having had their membership in a putative class seeking punitive damages brought to

their attention, gave no indication that they would withdraw from that class prior to the final decision of the case below. Thus, only the Chief Justice and one other Justice of the court below are presumptively in a position to adjudicate appellant's cause should further non-ministerial proceedings in this case be required by this Court's disposition of this appeal.

IV

The *dicta* in opinions of this Court suggesting that the Contract Clause does not control judicial action cannot be applied to the creation and retrospective imposition by state courts of common law causes of action which seriously impair the obligations of contracts. The express prohibition in the Contract Clause against a state "Law" which impairs the obligation of contracts should not be interpreted to exempt one of the primary sources of state law. The Framers of that Clause and the Members of the First Congress understood that their use of the word "law" in the Constitution and in statutes referencing state law presumptively comprehended state common law. Further, the word "law" as defined under English common law clearly comprehended both statutory and common law. As this Court has made clear, the Framers of the Constitution were familiar with English common law, and this Court has frequently looked to English common law to determine the meaning of words in the Constitution. *E.g.*, *Ingraham* v. *Wright*, 430 U.S. 651, 661 (1977).

So interpreted, the Contract Clause was violated by the action of the court below in imposing retrospectively a severe burden on the contract at issue in this case in the form of a cause of action providing for virtually unlimited punitive damages which did not exist until years after the contract was executed and performed.

V

Under Magna Carta, English common law and the English Bill of Rights of 1689, punitive damage awards assessed in civil litigation were regarded as "fines" as that word was understood

by the Framers of the Excessive Fines Clause. Magna Carta, the English Bill of Rights, the Virginia Declaration of Rights and, finally, the Bill of Rights, prohibited "excessive fines." Excessive fines were understood from the beginning to be those which were disproportionate. Based on this history, cases in this Court applying the Cruel and Unusual Punishments Clause in parallel fashion to punishments administered in criminal and non-criminal proceedings, and the avowedly punitive purposes of the $3,500,000 award against appellant in this case, the Excessive Fines Clause should be held applicable to this punitive damage award. Once applied, there is no doubt that the gross disproportionality between that award and the contract damages sustained — a ratio of over 2,000-to-1 — violates the Excessive Fines Clause.

The punitive damage award in this case is manifestly inconsistent with nearly all concepts of due process. It was extravagantly disproportionate, imposed pursuant to a cause of action and standards of conduct which did not exist at the time the conduct to which it is now applied occurred, serves no legitimate state purpose except that of providing a windfall to appellees, and is administered as a part of a capricious, arbitrary process susceptible to emotional and passionate reactions rather than the application of known legal standards. This Court and its members have laid increasingly bare over the last decade the incongruity between such uncontrolled (and uncontrollable) punitive damage awards and the fair administration of justice. *E.g., Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-13, slip op., at 6 n.4, 53 U.S.L.W. 4866, 4874 (June 26, 1985) (Brennan, J., dissenting). The irrationality of the award in this case requires this Court finally to intervene under the Constitution.

ARGUMENT

I

THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE ALL FOUR OF THE QUESTIONS PRESENTED

Since enactment of § 25 of the Judiciary Act of 1789, this Court has, under specified circumstances, possessed statutory

jurisdiction over any "final judgment or decree in any suit" in the highest court of a State in which the suit could be brought. 1 Stat. 73, 85. The present formulation of this provision grants the Court power to review such final judgments where the validity of a statute is drawn into question on constitutional grounds and the decision is in favor of its validity or where any title, right, privilege or immunity is set up or claimed under the Constitution. 28 U.S.C. § 1257(2), (3).

As these statutes implement, and as Art. III, § 2 of the Constitution provides, this Court is given power over cases, not issues or questions. Therefore, for example, dismissal of an appeal is appropriate only in the "total absence . . . of *any* question . . . which would give this court jurisdiction." *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 240, 263 (1836) (emphasis added).

Of course, for the Court to have jurisdiction over a case, either the constitutionality of a statute must be "drawn into question" or a right, title, privilege or immunity under the Constitution must be "set up or claimed." The Court has determined that this standard is met where a question has "been *either* raised or squarely considered and resolved in the state court." *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983). While some earlier cases suggested that the inquiry under this "neither pressed nor passed upon" rule was jurisdictional, *id.*, at 219, and while decisions of this Court have been, on this point, "in some respects not entirely clear," *id.*, at 218, the Court's most recent decisions stand for the proposition that the "neither pressed nor passed upon" rule serves only as a prudential restriction on this Court's power to decide questions presented by cases over which this Court otherwise has statutory jurisdiction. *See Vachon* v. *New Hampshire*, 414 U.S. 478 (1974); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Thus, where the Court has jurisdiction over a case because at least one federal question has been properly pressed or otherwise passed upon, the Court may consider other constitutional questions raised in that case provided prudential concerns do not counsel otherwise.

Appellant will demonstrate that all four of its questions were properly presented below and that, even if this Court should hold otherwise with respect to one or more of those questions, the relevant prudential considerations militate in favor of consideration of those questions in this case.

A. The Appellate Question

Appellant undeniably challenged, in its Brief filed in connection with its Application for Rehearing, the constitutionality of § 12-22-72, *Code of Alabama* (1975), by asserting its right to "due process and . . . equal protection . . . protected by the Fourteenth Amendment of the Constitution of the United States." (J.S. App. 81a).[1] In overruling the Application for Rehearing without opinion by a five-to-four vote, the court below did not state whether it "considered and resolved" this constitutional challenge. However, there can be no serious argument over the fact that appellant presented its challenge to § 12-22-72 in a manner consistent with at least 124 years of established practice in the court below.

Starting with its decision in *Lawrence* v. *Jones*, 37 Ala. 388 (1861), the Supreme Court of Alabama has entertained and decided constitutional challenges to, and questions involving the interpretation of, § 12-22-72 or its predecessors in no fewer than seventeen cases in which those questions were presented for the first time after the court below had rendered its decision in those cases.[2] As recently as 1971, the court below entertained and overruled on the merits a challenge to § 12-22-72 under the Equal Protection Clause which was raised for the first time after the court's decision in the case. *Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1971).

---

[1]Under Rule 20, Ala. R. App. P., it is sufficient that "issues presented on appeal [are presented] in the appellant's brief." As stated in the committee comments on Rule 20, that Rule "emphasizes the spirit in which these rules are intended to operate: to reach the merits of litigation."

[2]The sixteen cases in addition to *Lawrence* v. *Jones* are cited in appellant's Jurisdictional Statement at 12 & n.5.

In not a single one of these seventeen cases has the court below ever suggested that questions related to § 12-22-72 should, let alone must, be raised in that court prior to its final decision in a case potentially implicating that statute. The uniformity of this practice is consistent with the fact that the non-discretionary imposition of its ten percent penalty may be viewed as not at issue or reduced to any appealable order until the trial court's judgment is affirmed.

The action of the court below in overruling appellant's Application for Rehearing does not provide any basis for inferring an intent on its part to depart from this extraordinarily long and uniform practice even assuming, *arguendo*, that such a departure would be recognized as depriving this Court of appellate jurisdiction over this case under all the circumstances present here and as discussed more particularly below with respect to this Court's power to decide Questions 3 and 4.

This Court has made clear that state court procedural barriers to consideration of federal questions must be "strictly or regularly followed" in order to deprive this Court of its power to review substantial federal questions. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). Here, there is no such barrier; refusal of this Court to take appellate jurisdiction over this case would require the Court to go beyond repudiation of the principle established in *Barr* and the cases cited therein.

B. The Disqualification Question

The order entered by the court below on March 8, 1985 denying appellant's Motion for Disqualification reads, in pertinent part, as follows:

> "[T]he Court is of the opinion that . . . each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each Justice having voted not to recuse . . . ."

(J.S. App. 64a). On its face, this order establishes that the "court" below, albeit on a Justice-by-Justice basis, considered and reached the *merits* of appellant's challenge to the qualifica-

tions of Justice Embry and the other eight Justices as members of the putative class Justice Embry purported to represent in his bad faith action against Blue Cross. Inasmuch as appellant's Motion for Disqualification was expressly based on the Due Process Clause of the Fourteenth Amendment (J.S. App. 87a-88a, 124a-125a), the "court" necessarily reached and decided this federal constitutional question against appellant. Thus, it cannot plausibly be argued that the refusal of eight of the Justices below to pass on Justice Embry's qualifications (or on one another's) constituted a "non-decision" of that question for purposes of this Court's jurisdiction or that this question was not otherwise properly presented.

C. The Contract Clause and Excessive Fines Clause Questions

Appellant submits that once this Court satisfies itself that it has jurisdiction over a *case* under either 28 U.S.C. § 1257(2) or (3), then the question of the propriety of its deciding other federal questions brought by an appellant or petitioner to this Court in that case raises only prudential concerns. However, before addressing the prudential considerations relevant to this Court's reaching Questions 3 and 4, appellant will briefly demonstrate that the presentation of each of these questions, standing alone, would warrant this Court's taking jurisdiction over this case.

The general issue raised by both Questions 3 and 4 is whether appellant's raising them after the December 7, 1984 decision of the court below was timely. As appellant demonstrated above with respect to the practice of the court below as regards its entertaining questions for the first time after its decision in a case implicating § 12-22-72, and as appellant has previously demonstrated in its Jurisdictional Statement, at 14-15, and Reply Memorandum, at 3-5, *if* there is *any* rule in the court below on this general timeliness issue, that rule would not have precluded the presentation of Questions 3 or 4 after the December 7, 1984 decision. Furthermore, no such

rule was invoked by the court below in overruling appellant's Application for Rehearing.

In any event, appellant submits that there are few cases ever likely to be brought to this Court in which the doctrine of "surprise" might be more appropriately applied to compel the Court's consideration of substantial and important federal constitutional questions which were not raised until after the initial decision of the state court was rendered. Under that doctrine, as articulated in cases such as *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930), and *Saunders* v. *Shaw*, 244 U.S. 317 (1917), this Court clearly has the power to decide Questions 3 and 4.

Prior to the affirmance of this $3,500,000 punitive damage verdict on December 7, 1984: (1) the largest punitive damage award affirmed in a bad faith action by the court below, with or without remittitur, was $100,000, *Gulf Atlantic Life Insurance Co.* v. *Barnes*, 405 So.2d 916 (Ala. 1981); (2) the court below had *never* affirmed a punitive damage award in a bad faith case in which a partial payment had been made; and (3) *no* punitive damage award had ever been affirmed by the court below where the contract issue had been sent to the jury for decision. Furthermore, while fraud and conspiracy counts against appellant had been withdrawn by the appellees prior to trial, the December 7, 1984 *per curiam* opinion, authored by Justice Embry, purported to find appellant guilty of fraudulent conduct in four passages (J.S. App. 22a, 35a, 36a and 37a), and a conspiracy in two passages (J.S. App. 33a, 35a).

Finally, the greatest, and a completely unforeseeable, development in this case was the discovery that the major changes in Alabama law brought about by the December 7, 1984 decision were perhaps rooted in the participation in the case by a Justice with strong pecuniary, fiduciary and emotional interests in the rulings of law contained in the "*per curiam*" opinion which he had drafted.

Appellant concedes that this Court's assumption of jurisdiction over Questions 3 and 4 would probably do little to clarify

the occasions on which this Court will or will not invoke the doctrine of surprise in the future, or, as regards Question 3, will invoke the doctrine of *Dewey* v. *Des Moines*, 173 U.S. 193 (1899), under which this Court may decide a question that is no more than an "enlargement" of a question otherwise properly presented to a state court. *Cf. Illinois* v. *Gates*, 462 U.S., at 220. This is because appellant assumes that the series of highly unusual events which have occurred in this case, once corrected by this Court, would presumably never again be duplicated in the administration of justice in any court system in the United States. Unless, however, this Court is prepared to repudiate altogether the doctrine of surprise, it should regard itself as having the power to decide these questions.

Finally, prudential considerations dictate that the Court reach and resolve Questions 3 and 4. The concern raised in *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969), is inapplicable because the record provides a fully adequate basis on which to decide these purely legal questions.

Nor are the other prudential concerns set forth in *Webb* v. *Webb*, 451 U.S. 493, 500-01 (1981), applicable here. Section 12-22-72 cannot be construed so as to avoid the constitutional issue it raises, and in any event appellant fruitlessly gave the court below no fewer than three opportunities to do so. Nor are there any credible independent or adequate state grounds upon which any of the four questions here could have, and would have, been decided favorably to appellant by the court below. Eight Justices of that court, given two opportunities by appellant, refused to pass on the qualifications of Justice Embry even though appellant raised what should have been dispositive *state* law objections to his participation in this case as well as its federal constitutional objections. The court below, having three opportunities to do so, was unwilling to act on appellant's Excessive Fines Clause argument even though appellant had argued for remittitur as a matter of *state* law.

Nor, having three opportunities to do so, did the court below indicate any concern about the retrospective imposition on

appellant of a $3,500,000 punitive damage award based upon a cause of action that did not exist when the contract was executed and performed and upon the application of newly formulated rules under that cause of action. It would be disingenuous to suggest that the court below was or is prepared to constrain its development of common law torts in Alabama, and particularly the award of large punitive damage judgments, by subjecting that development to the constraints which would be imposed on that development by the interpretations of the Contract Clause and the Excessive Fines and Due Process Clauses which appellant advanced below and advances here. In addition, because Questions 3 and 4 present issues of first impression in this Court, and because the construction of the Contract and Excessive Fines Clauses urged by appellant arguably is contrary to *dicta* in prior opinions of this Court, customary principles of comity are inapplicable because there would be "little point in requiring a litigant to request a state court to overrule or modify one of this Court's precedents." *Illinois* v. *Gates*, 462 U.S., at 251 (White, J., concurring in the judgment).

Finally, the concern for this Court's own workload, *Webb* v. *Webb*, 451 U.S., at 501, militates strongly in favor of resolution now of Questions 3 and 4. There can be no doubt that, having determined to hear argument on Questions 3 and 4, a failure by this Court to address and resolve those questions will predictably result in the presentation of those questions in other cases. Such litigation would be essentially senseless, generating ultimately both a greater workload for this Court in entertaining future cases and in state courts all over the country. Either the Contract Clause controls the retrospective imposition on contracts of newly recognized, judicially created causes of action providing for unbargained-for remedies in the form of virtually unlimited punitive damages, or it does not. Either the Excessive Fines Clause is applicable to grossly disproportionate awards of punitive damages in judicially created civil actions, or it is not. Either the Due Process Clause precludes the administration of punishment after a civil trial based on sub-

stantive rules that were nonexistent at the time the acts complained of were committed, or it does not.

II

SECTION 12-22-72, *CODE OF ALABAMA* (1975), ON ITS FACE AND AS APPLIED, VIOLATES THE EQUAL PROTECTION CLAUSE

A. Section 12-22-72 Violates the Equal Protection Clause Under Any Standard of Review

Section 12-22-72 of the Code of Alabama imposes an automatic ten percent penalty on an unsuccessful money-judgment appellant. This impost, paid to the appellee, is assessed irrespective of the merits of the appeal. Litigants other than those against whom money judgments have been entered are not exposed to any comparable penalty.

Because Alabama's appeal penalty manifestly places a substantial burden on the exercise of the statutory right of appeal by some appellants in Alabama without imposing *any* like burden on other appellants, it would appear that a majority of this Court would scrutinize it under "more powerful scrutiny than the minimal rational-basis test used to review classifications affecting only economic and commercial matters." *City of Cleburne* v. *Cleburne Living Center*, No. 84-468, slip op., at 4, 53 U.S.L.W. 5022, 5029 (July 1, 1985), (Marshall, J., concurring in the judgment in part and dissenting in part); *id.*, slip op., at 3-4, 53 U.S.L.W., at 5027 (Stevens, J., concurring). However, § 12-22-72 is unconstitutional even under the rational-basis test as applied by a majority of the Court in *City of Cleburne* because the provision's irrationality and discriminatory impact are obvious and unjustifiable.

B. Section 12-22-72 Places a Substantial and Unequal Burden on a Class of Appellants

That § 12-22-72 indisputably results in the unequal treatment of litigants in Alabama in their access to Alabama's appellate courts requires little discussion. In fact, appellees in this case took two prior appeals without any exposure to a massive

penalty if their appeals had been rejected. Plaintiff-appellants who seek to recover a money judgment from defendants can do so without risk in Alabama except for the potential application to them, as with any appellant, of Rule 38, Ala. R. App. P., for damages and costs if the affirming court finds the appeal to have been frivolous. Defendant-appellants in the same cases are subjected to the additional *in terrorem* effect of an obligatory ten percent forfeiture which increases the risks of an appeal, no matter how meritorious, in direct proportion to the amount at stake. Thus, the disincentive to appeal increases just as the sting of the judgment increases. A large judgment therefore carries its own inducement to refrain from exercising the right of access to the appellate courts.

C. The Unequal Burden on the Right to Appeal Imposed by § 12-22-72 Is Irrational, Arbitrary and Unconnected to Any Legitimate State Interest

Absent the special considerations associated with this Court's historic concerns regarding equal access to *appellate* courts, *see Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972) *and cases cited*, the inquiry under the Equal Protection Clause is whether a classification is "rationally related to a legitimate state interest," *City of Cleburne* v. *Cleburne Living Center*, slip op., at 6, 53 U.S.L.W., at 5023. Section 12-22-72 bears no rational relationship to any legitimate state interest.

The initial difficulty in evaluating § 12-22-72 is to identify any "state interest" which that statute may have been enacted to serve. Even the Supreme Court of Alabama has strained to identify any purpose. For example, in *Snellings* v. *Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934), that court observed that, while it had previously articulated the intent of § 12-22-72 to be "to penalize frivolous or delay appeals," it had not intended in that prior case to suggest that "such was its only purpose." The remainder of the opinion in *Snellings*, however, is devoid of any suggestion as to what other purpose might be served by § 12-22-72.

If, as indicated by *Snellings*, the purpose of § 12-22-72 is to penalize frivolous or dilatory appeals, and if, as is plain from the face of that statute and from *Snellings* itself, in imposing the penalty no judicial inquiry is to be made into whether a particular appeal was frivolous or taken for purposes of delay, then § 12-22-72 is arbitrarily overinclusive in that it sweeps within its reach non-frivolous appeals which could not remotely, as in the case at bar, be regarded as having been taken for the purpose of delay. At the same time, § 12-22-72 is arbitrarily underinclusive in that it does not apply at all to a frivolous or dilatory plaintiff-appellant, or to the whole range of similarly situated potential non-money-judgment defendant-appellants.

Finally, if it is intended to address frivolous appeals, § 12-22-72 overrides and nullifies Rule 38, Ala. R. App. P., under which all appellants who take frivolous appeals may be appropriately penalized after a judicial determination that the appeal was frivolous.[3] Appellant submits that the juxtaposition of § 12-22-72 and Rule 38 is irrefutable evidence of the irrationality of the former. *See United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 536-37 (1973).

The court below has also suggested that a purpose of § 12-22-72 is to provide *appellee litigants* with "additional damages." *City of Birmingham* v. *Bowen*, 254 Ala. 41, 47, 47 So.2d 174, 180 (1950). But neither *Bowen* nor any other case in the court below articulates any identifiable state purpose in providing a mandatory, arbitrary amount of "additional damages" to one class of litigants to be collected from another class of litigants whose appeals were neither frivolous nor taken for the purpose of delay. These "additional damages" are

---

[3]Rule 38 has been interpreted to permit the award of court costs (normally a nominal figure), and "damages" which, on one occasion, were assessed by the court below as $500 for the taking of a frivolous appeal. *See RMP, Inc* v. *Arledge*, 417 So.2d 158 (Ala. 1982). This $500 award would appear to be the highest award ever entered under Rule 38, making the penalty imposed on appellant under § 12-22-72 some 700 times greater than that award even though appellant's appeal was, by no rational measure, frivolous.

just that, and nothing more, because interest is separately assessed (presently at the rate of twelve percent per annum) against any appellant, if a money judgment is affirmed, pursuant to Rule 37, Ala. R. App. P., and § 8-8-10, *Code of Alabama* (1975).

In fact, the only consequence of § 12-22-72 is to provide an "automatic assessment of unproved damages," *Lindsey* v. *Normet*, 405 U.S., at 78, as a windfall to one class of litigants whose property interests in the money judgment are already fully protected by a supersedeas bond and the accrual of interest on their judgment, while the costs borne by another class of litigants — appellee-defendants — in defending non-frivolous appeals are not compensated in any manner whatsoever.

Assuming, *arguendo*, that this "automatic assessment" and the state "interest" behind it are somehow "rational," it is clear that they are insufficient to sustain § 12-22-72 under this Court's decision in *Lindsey* v. *Normet*. As the Court stated in *Lindsey*, a State may employ "reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends." 405 U.S., at 78. As demonstrated above, § 12-22-72 is not "reasonably tailored" to serve any identifiable state interest not already served by other statutes and rules. The ten percent penalty assessed under § 12-22-72 does nothing more than up "the stakes," *id.*, at 79, and is no different in kind from the unproved punitive damages imposed by the jury in this case.

III

THE PARTICIPATION OF JUSTICE EMBRY IN THE CONSIDERATION AND DECISION OF THIS CASE VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR HEARING OF ITS APPEAL

While this case was before the Supreme Court of Alabama, Justice Embry of that court engaged in a series of acts which compel the conclusion that he had a direct, pecuniary interest

in the outcome of this case. Indeed, and unfortunately, his conduct permits the inference that portions of the *per curiam* opinion below were written with the knowledge that they might well enhance the likelihood of recovery of punitive damages in his Blue Cross case. In addition, Justice Embry's conduct must be evaluated in the larger context of the alleged difficulties he had had over many years with partial and non-payment of his own claims against insurance companies. If conduct of this nature by a Justice of the highest court of a State can escape correction, both the appearance and the reality of constitutional fairness in the disposition of appellate cases, which is central to the integrity of the administration of justice, will be irreparably damaged.

Justice Black articulated in four simple, declarative sentences the constitutional considerations applicable to Justice Embry's conduct in this case:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In re Murchison, 349 U.S. 133, 136 (1955).

The three principles articulated by Justice Black are clear: (1) no judge may have actual bias; (2) no judge may be the judge of his or her own cause; and (3) no judge may decide cases in which he or she has an interest in the outcome. As appellant will demonstrate, the indisputable facts before this Court in this case establish that Justice Embry's participation in this case violated all three of these constitutional principles, the violation of any one of which would be a sufficient basis for reversal of the judgment below.

A. Justice Embry's Direct, Personal Interest in the Outcome of This Case Violated Appellant's Rights Under the Due Process Clause

Until appellant received and understood the implications of the contents of the transcript of Justice Embry's deposition,

appellant's challenge to Justice Embry was based largely on the inescapable identity between the legal issues decided in its case and the issues necessarily raised by Justice Embry's bad faith action against Blue Cross.

This identity of issues goes well beyond the fact that Justice Embry, as a Justice whose vote was necessary to the outcome of appellant's appeal, had himself filed two bad faith actions against insurance companies and was actively involved in the prosecution of at least one of those actions during the time he was drafting the opinion below:

(1) In his complaint against Blue Cross, Justice Embry sought punitive damages for partial payment of claims (J.S. App. 98a). Until the decision below, the Supreme Court of Alabama had erected what appeared to be an insurmountable barrier to punitive damages where partial payment had been made, a barrier never breached until December 7, 1984.

(2) The Blue Cross complaint sought compensatory damages for breach of contract and punitive damages. Until December 7, 1984, Justice Embry would first have had to prevail on his contract claims as a matter of law in order to recover punitive damages for himself and the class he purported to represent.

(3) Until the decision below, the largest punitive damage award ever affirmed by the court below with or without remittitur was $100,000. The affirmance of the $3,500,000 punitive damage award in this case had the immediate effect of enhancing materially both the jury potential and settlement value of his own case.[4]

---

[4]This phenomenon is observable in the history of this litigation. As the tort of bad faith went from non-recognition in 1978 in Alabama to the decision in this case, appellees' prayer for punitive damages correspondingly escalated from an initial $2,200,000 to $4,000,000 to $30,000,000. (J.A. 8-10, 17-21, 24-30). *See also* Morrison, *Punitive Damages and Why the Reinsurer Cares*, XX *The Forum* 73, 74-75 & nn.8-10 (ABA Fall 1984).

(4) The *per curiam* opinion's characterization on four occasions of appellant's conduct as fraudulent (J.S. App. 22a, 35a, 36a, 37a), despite the withdrawal of fraud counts against appellant prior to trial, neatly matched the fraud allegations in the Blue Cross complaint. (J.S. App. 98a).

In addition to these specific points at which Justice Embry's complaint intersected the *per curiam* opinion, he clearly had a general, direct and substantial interest in any expansion of the tort of bad faith which could enhance the settlement value or potential recovery in his case.

As this Court observed in *In re Murchison*, the "interest" in the outcome of a case which will constitutionally disqualify a judge "cannot be defined with precision. Circumstances and relationships must be considered." 349 U.S., at 136. The general test laid down by this Court is whether the "situation is one 'which would offer a possible temptation to the average man as a judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972), *quoting Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

Although both *Ward* and *Tumey* were criminal cases, this Court squarely reaffirmed their principles and applied them to affirm the disqualification of the members of a state board of optometry who stood to benefit monetarily, to an uncertain degree, from their performance of an administrative adjudication. *Gibson* v. *Berryhill*, 411 U.S. 564, 578-79 (1973).

It is particularly relevant here that this Court's affirmance in *Gibson* v. *Berryhill* of the court's holding below regarding the pecuniary interests of the board members was apparently based upon that lower court's presumption — as opposed to a proven fact — that the board members would realize personal gain. *See Berryhill* v. *Gibson*, 331 F. Supp. 122, 126 (M.D. Ala. 1971) (three-judge court). In this case, whether Justice Embry or the class he purported to represent ultimately would have benefitted from the decision in this case cannot be known because that litigation was dismissed, without any apparent notice to the members of the putative class, on April 16, 1985.

(App. 3a-4a, *infra*). There can, however, be no doubt that Justice Embry had direct pecuniary and fiduciary interests in the outcome of this case during virtually the entire time in which it was *sub judice* in the court below.

B. Justice Embry, By His Participation in This Case Below, Effectively Was Sitting as Judge in His Own Cause in Violation of the Due Process Clause

The participation of Justice Embry in this case created the potential of his actually deciding, in advance, issues in his own litigation pending at the time he wrote the *per curiam* opinion.

As enunciated by this Court as a constitutional principle and by courts everywhere which have addressed comparable situations as matters to be resolved on the basis of non-constitutional rules and plain common sense, "[n]o man can be a judge in his own cause." *Earl of Derby's Case*, 77 Eng. Rep. 1390 (K.B. 1614) (Lord Coke).[5]

Justice Embry presumably would have disqualified himself if his Blue Cross case had been subsequently pursued to a verdict and appeal. Indeed, under Alabama precedent the entire court below might have disqualified itself. *See Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967). However, even assuming disqualification of all members of the court below in such a situation, Justice Embry would still have managed to become the judge in his own cause because any "temporary" court constituted to dispose of the Blue Cross appeal would presumably apply the law of Alabama as they found it, just as the Circuit Court of Jefferson County would have been obliged to do.

This perversion of the concept of a fair trial in a fair tribunal should be declared unconstitutional at the outset. The potential that a judicial opinion has been affected by a judge's own

---

[5]In an early 18th-century English case, Chief Justice Holt made reference to yet another English case in which a judge was "laid by the heels" for deciding a case to which he was a party. *Wright* v. *Crump*, 87 Eng. Rep. 1055, 1056 (Q.B. 1702).

pending litigation raising the same or similar legal issues clearly deprives a party in appellant's position of a fair hearing. Whether Justice Embry might or might not have realized pecuniary gain is legally irrelevant.[6]

C. Justice Embry's Conduct Constitutes Actual Bias in Violation of Appellant's Rights Under the Due Process Clause

An allegation of actual bias, because it necessarily challenges the personal integrity of a sitting judge, should not be, and has not been, lightly entertained by this Court. *See generally Gibson* v. *Berryhill*, 411 U.S., at 579 (refusal of Court to pass on finding by court below of actual bias in decisionmakers).

The integrity of one judge of an appellate court is, however, a possible reflection of the integrity of that particularly collegial body and, more importantly, a reflection on the integrity of the process by which justice is meted out in our legal system. As Chief Justice Torbert (J.S. App. 66a) commented in his opinion specially concurring in the denial of appellant's first motion to disqualify Justice Embry:

> "It is indeed unfortunate that the litigation has resulted in a serious charge impugning the honesty and integrity of the Court and its members."

Whatever may have been meant by this comment, it *is* indeed unfortunate that a situation even approaching the gravity of this disqualification problem and its reflection on the court below was thrust upon appellant as an issue in this case. However, it would be even more unfortunate for the long-term administration of justice in this country if appellant were to be returned to the courts of Alabama in this case unless every vestige of bias against it is removed.

---

[6]Because the principle that no man may be a judge in his own cause is so fundamental to any decent conception of the fair administration of justice, cases actually raising such a fact pattern appear to be quite rare. *See Middletown National Bank* v. *Toledo, A.A. & N.M.R.R.*, 105 F. 547 (C.C.S.D.N.Y. 1900).

It is rare that the actual bias of a sitting judge can be established by his own words. *Berger* v. *United States*, 255 U.S. 22, 32-36 (1921), presented such a situation. In that case, this Court acted swiftly and decisively — in the face of timidity by the court of appeals — to make clear that two criminal defendants of German ancestry could not be subjected to having their cause tried by a judge who had publicly slurred peoples of Germanic origin.

Any hostility or prejudice in a judge towards ethnic or racial groups is intolerable. And, while the same hostility or prejudice directed towards a corporation or industry may not rise to quite the same level, any litigant is surely entitled not only to justice but the appearance of justice: "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

The transcript of Justice Embry's deposition testimony stands, with every inference drawn charitably in his favor, as evidence of judicial prejudice against a sector of corporate America. The verbatim transcript of that deposition is set out in an appendix to the Jurisdictional Statement. (J.S. App. 145a-265a).

There is, unfortunately, more to appellant's challenge than Justice Embry's deposition and his conduct detailed above. From the face of their opinions specially concurring in the denial of appellant's initial Motion for Disqualification, it seems apparent that Chief Justice Torbert and Justice Maddox had been unaware of Justice Embry's litigation against Blue Cross in which they were putative class members. It is unclear, on the record before this Court, whether any of the other six Justices were aware of that litigation, and appellant is understandably reluctant to draw any inferences on that issue. However, as far as the record reflects, *only* Chief Justice Torbert and Justice Maddox announced their intent to withdraw as members of that putative class prior to the settlement of that litigation on

April 16, 1985. (J.S. App. 66a, 69a; App. 4a). If, contrary to appellant's arguments advanced with regard to Questions 1, 3 and 4, appellant is not constitutionally entitled to outright and final reversal of the judgment below, this Court must set forth the conditions under which appellant's cause is to be reheard. The importance of a decisive response by this Court goes well beyond the immediate and substantial interests of appellant:

> "Time and experience have demonstrated that the *public*, as well as litigants, will tolerate the honest mistakes of those who pass judgment, but not the biased acts of those who would deprive litigants of a fair and impartial trial. Foremost among the responsibilities imposed upon a reviewing court is to make sure that this foundation of our judicial system be not undermined."

Inland Steel Co. v. *NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (emphasis added). No Justice of the court below who did not withdraw from the putative class is constitutionally in a position to sit in judgment of appellant at any time in the future in this case.

IV

THE RETROSPECTIVE IMPOSITION OF PUNITIVE DAMAGES UNDER A NEW CAUSE OF ACTION VIOLATES APPELLANT'S RIGHTS UNDER THE CONTRACT CLAUSE

On May 5, 1981, the Alabama legislature and governor cooperated in the enactment into law of a statute, § 27-1-17, *Code of Alabama* (1975), which created a statutory right of action for persons who believed they had been wrongfully denied payment on health or accident insurance claims. Under that law, a successful plaintiff is entitled to recover the denied payment plus one and one-half percent of the amount of the claim for each month the claim remains unpaid. App. 2a, *infra*.

On October 2, 1981, the Supreme Court of Alabama, through the vehicle of several opinions issued that day, *see* pp. 3-4, *supra*, effectively overrode the Alabama legislature's pol-

icy judgment by enacting into the common law of Alabama a cause of action for tortious bad faith failure to pay an insurance claim. In an exercise of pure policymaking analytically indistinguishable from the policymaking that led to enactment of § 27-1-17, the court below also created a remedy for wrongful denial of an insurance claim—punitive damages in amounts limited, for the most part, only by the imaginations of juries.

At the time this bad faith action was created and during the ensuing three years, the Supreme Court of Alabama developed a number of rules under which bad faith actions were to be litigated, including the rule that partial payment of a claim could be expected to preclude a punitive damage award and the limitation that punitive damages would not be imposed unless a plaintiff could show entitlement to recovery as a matter of law on the contract claim.

On December 7, 1984 the court below ratified the sentiments of a jury that appellant should be punished in the amount of $3,500,000 for a breach in 1977 and 1978, resulting in $1,650.22 in damages, of a contract which had been executed in 1967. Between 1967 and 1978, appellant could not possibly have known that this contract carried this level of exposure and could not have known what Alabama required of it in processing insurance claims to avoid the risk of punitive damages because there was *no* Alabama law on the subject at that time. When, in 1981, the Alabama legislature did impose an extra obligation on insurance contracts requiring prompt payment of claims, it did so by selecting a reasonable and proportionate remedy. But even prescience by appellant as to Alabama's subsequent enactment of a statutory remedy would have been a wholly misleading exercise in light of the draconian and retrospective revision of Alabama law five months later by the court below.

It cannot be seriously doubted that, had the Alabama legislature enacted in 1981 the tort of "bad faith" as it has evolved in the court below since then, retrospective application of that statute to contracts entered (and performed) years before

could not survive a challenge under the Contract Clause. The question is whether Alabama can accomplish this otherwise unconstitutional result by virtue of the fact that its judicial — rather than its legislative — branch created this new and substantial retrospective obligation.

A. The Contract Clause Should Be Applied to Judicial Action Which Is Essentially Legislative in Character

In *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), this Court had before it the question whether a substantial change in construction given to an Oklahoma statute by the highest court of that State constituted an impairment of obligations under the Contract Clause. A statute had been reinterpreted by that court subsequently to the execution of a contract to take on a substantially different meaning affecting existing obligations under the contract.

This Court held that such a reinterpretation of a state statute would not violate the Contract Clause, stating:

> "It has been settled by a long line of decisions, that the [Contract Clause] is directed only against impairment by legislation and not by judgments of courts. The language — 'No State shall . . . *pass any . . . law* impairing the obligation of contracts' — plainly requires such a conclusion."

263 U.S., at 451 (emphasis added by the Court) (footnote omitted). On its facts and as properly understood in the context of every one of the prior decisions relied upon in it, *Tidal Oil* did not decide, nor could it have decided, the extent to which the Contract Clause controls the power of state courts to impair the obligations of contracts pursuant to their exercise of common law power to create tort actions and accompanying remedies. *Tidal Oil* stands for no more than the proposition that reinterpretation by a state court of a statute does not implicate the Contract Clause. *See Stockholders of the Peoples Banking Co.* v. *Sterling*, 300 U.S. 175, 182 (1937).

The decision in *Tidal Oil* may be rationalized on the theory that the court is assumed previously to have misunderstood the

intent of the legislature in giving the statute its earlier interpretation. Thus, reinterpretation would clearly constitute the performance of a judicial function: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). The same rationalization is not available to insulate the creation of new, major additional remedies for breach of contract from Contract Clause scrutiny, because the state court would, by definition, be engaged in making new law with each such pronouncement. Each would be a classic exercise of policymaking associated with the legislative process: "Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter . . . ." *Id.*

Whether the Contract Clause should be construed to control the creation of new common law rights of action by state courts for breach of contract requires this Court to determine the meaning of the word "Law" as used in that Clause.

Although the debates in the Constitutional Convention support appellant's position regarding what the Framers meant by the word "Law" in the Contract Clause,[7] other highly relevant historical materials establish even more conclusively that it would be unreasonable to assume that the Framers would have intended to exclude common law as formulated by the state courts.

---

[7]The concept of the Contract Clause was introduced at the Convention by Rufus King, who proposed language "in the words used in the Ordinance of Congs establishing new States." 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 439 (1911). The precise ordinance referred to was the Ordinance for the Northwest Territory. *See* B. Wright, *The Contract Clause of the Constitution* 6 (1938). As enacted in 1787 by the Congress convened under the Articles of Confederation, this provision stated that "no law ought ever to be made or have force . . . that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*." Art. II, 44 Stat. 1851, 1852 (pt. 1). This broad phraseology almost certainly swept within it judicial creation of common law obligations. Indeed, § 4 of that Ordinance expressly recognized the "common-law jurisdiction" being conferred on the judges of that Territory. *Id.*, at 1851.

There are at least three persuasive bases for believing that the word "Law" should be interpreted to include the laws made by state courts in the course of their exercise of common law "lawmaking" power.

(a) This Court has often recognized the relevance of the meaning at English common law of terms used in the Constitution to ascertaining the intent of the Framers, *see, e.g., Schick* v. *United States*, 195 U.S. 65, 69 (1904), and Solicitor General William Blackstone's *Commentaries* have been singled out as "the most satisfactory exposition of the common law of England." *Id.; see also Ingraham* v. *Wright*, 430 U.S. 651, 661 (1977). Blackstone's definition of the term "law" included both common law and statute laws:

> "The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law."

1 W. Blackstone, *Commentaries on the Laws of England* *63 (1765).

(b) The Framers used phraseology similar to that of the Contract Clause in another provision of the Constitution, the Supremacy Clause, Art. VI, cl. 2, which makes federal law supreme over "anything in the Constitution or Laws of any State." If this reference to the "Laws of any State" had been interpreted in the wooden fashion suggested by the *Tidal Oil* Court, it is easily imaginable that the Supremacy Clause, and therefore federal law, would be frequently subverted. The Supremacy Clause has, of course, been routinely construed to subordinate state common law to superior federal law. *E.g., Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). The available evidence is that the Framers intended no difference between the word "Laws" as it appears in the Supremacy Clause and the word "Law" in the Contract Clause.[8]

[8]On August 23, John Rutledge of South Carolina proposed to amend the Supremacy Clause as it was then drafted as Art. VIII. The Supremacy Clause both as it stood and as Rutledge proposed it to be amended contained the phrase "laws of the several States." 2 M. Farrand, *supra*, at 183, 389. On August 28, Mr. Rutledge, at the close of the only recorded substantive debate on the Contract Clause, proposed to insert the phrase "nor pass bills of attainder nor retrospective laws" into what was then Art. XII to embody the principle of the Contract Clause. *Id.*, at 440.

(c) Additional evidence of the Framers' understanding of the meaning of the word "Law" in the Contract Clause is provided by an examination of the manner in which that term was employed by the First Congress.

Section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 *(codified at* 28 U.S.C. § 1652), provides that, except where the Constitution, treaties or statutes of the United States otherwise require, "the laws of the several states . . . shall be regarded as rules of decision . . . in the courts of the United States." For almost a century, and not until fourteen years after it decided *Tidal Oil*, this Court labored under the assumption that the special Senate Committee of the First Congress which drafted § 34 did not mean the term "laws of the several states" to include the common law rules adopted by state courts. *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842).

A half century after *Swift* v. *Tyson*, Justice Field, writing alone in dissent, directly challenged this proposition: "The term 'laws' in the Constitution and the statutes of the United States is not limited solely to legislative enactments unless so declared or indicated by context." *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U.S. 368, 398 (1893) (Field, J., dissenting).

In 1938, this Court finally reversed the doctrine laid down in *Swift* v. *Tyson* on two grounds. First, as a matter of construing § 34, the Court accepted the conclusion of Professor Warren that the legislative history of § 34 established that its Framers intended the word "laws" to include "unwritten as well as written" laws. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 72-73 & n.5 (1938).[9]

That legislative history, as set out in Professor Charles Warren's article cited by the Court, established that the original

---

[9]More than three decades before, Justice Holmes, also in dissent, restated the heart of Justice Field's criticism of *Swift:* "[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting, joined by Brandeis & Stone, JJ.), *as quoted in Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 79 (1938).

draft of what ultimately became § 34 was in the handwriting of Senator Oliver Ellsworth of Connecticut and that it expressly provided that a State's "unwritten or common law," as well as its statutes, would operate as rules of decision for federal courts in cases in which no federal constitutional, statutory or treaty provision itself provided the rule of decision. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 85-88 (1924).

Because Ellsworth and four other members of the Committee appointed to draft the Judiciary Act of 1789 had also served in the Constitutional Convention, they "were familiar with its intent as to the Judiciary." *Id.*, at 57 (footnote omitted). And, as this Court has observed, the Judiciary Act of 1789 is itself "weighty evidence" of the true meaning of the Constitution because it was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument." *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 297 (1888).

The inference to be drawn from both Professor Warren's research and this Court's acceptance of it in *Erie* is that Ellsworth and the First Congress understood that when they made reference to the "laws" of the several States, that reference included the common law of the States unless otherwise provided.[10] Therefore, *Erie* strongly supports the proposition that the First Congress and the Framers understood that a reference to "laws" or "law" would comprehend the common law of the several States as developed in their courts.

Second, the *Erie* Court observed that the power granted to federal courts under *Swift* v. *Tyson* had been construed broadly to declare " 'general law' [which had been] held to include the obligations under contracts entered into and to be performed within the State." 304 U.S., at 75 (footnote omitted). "[T]he

---

[10]In a subsequent draft Ellsworth transformed the terms "Statute law" and "unwritten or common law" into a unitary concept — the "laws of the several States" — because in that era the term "laws of the several States" would be understood as comprehending the common law of each State. 37 Harv. L. Rev., at 86.

unconstitutionality of the course pursued has now been made clear . . . ." *Id.*, at 77-78. Thus, if Congress could neither have prescribed nor authorized the federal courts to prescribe a "federal general common law," *id.*, at 78, the Framers must, in § 34 of the Judiciary Act of 1789, the Supremacy Clause, and the Contract Clause, have focused upon the importance of the lawmaking power of the several States as had been, and would be, exercised by their state courts: "[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." 304 U.S., at 78.

Understood in this context as a case of constitutional imperative, 304 U.S., at 78-80, *Erie* is even more closely on point because disregard of the importance of the power of state courts to develop state common law subject only to constitutional restraints such as the First Amendment, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), would violate principles of federalism lying at the core of our Constitution. *Erie* recognized that the Framers, in their use of the word "Law" or "Laws," were supremely conscious of the lawmaking powers of the several States as those powers had been, and would be, exercised by their state court systems.

What the Framers of the Contract Clause surely recognized and what continues to be true to this day is that much of the substantive law of contracts in this country is shaped by the common law. *Cf. Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (Burger, C. J.) (plurality opinion) ("statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct"). To suggest that the Framers would have intended, by the use of the term "Law," to include only legislative enactments would necessarily suggest that whatever protection was being extended to the right of contract was not to be extended to the lawmaking bodies — state courts — in which the substantive rules of contract were most likely to be announced and, from time to time, changed. The burden to show that the Framers intended

such a result is on the appellees in this case, and it cannot be met.[11]

B. The Bad Faith Action Created in 1981 By the Supreme Court of Alabama Imposes, Retrospectively, an Unconstitutional Obligation on the Insurance Contract in This Case

This Court's recent decision in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), reaffirmed the general rule that the Contract Clause is not an absolute barrier to state action impairing the obligation of contracts and that "the absolute language of the Clause must leave room for 'the "essential attributes of sovereign power," . . . necessarily reserved by the States to safeguard the welfare of their citizens.'" *Id.*, at 244, *quoting United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21 (1977). Whether any particular state action violates the Contract Clause will depend on the "severity of the impairment" as balanced against the "nature and purpose" of the state action. 438 U.S., at 245.[12]

The severity of the impairment of appellant's contract with the City of Mobile is manifest both from the sheer size of the punitive damage award and because this new tort created a large number of contingent liabilities of unlimited scope with respect to insurance claims processed by appellant prior to the announcement of this potential liability. Appellant engages in

---

[11]As detailed in notes 7 & 8, *supra*, it would be incorrect to attribute any significance to the incorporation of the Contract Clause into what was then Art. XII along with the Bill of Attainder Clause (and ultimately the Ex Post Facto Clause) so that the Contract Clause became an object of the verb "pass." John Rutledge, who first suggested the incorporation, 2 M. Farrand, *supra*, at 440, may reasonably be assumed to have been aware of the meaning of the word "laws" as it appeared in Art. VIII both before and after his proposed amendment to that Article on August 23, and there is no evidence that he intended a different meaning in his proposal to amend the language of the Contract Clause as it had been proposed by Rufus King on August 28.

[12]There is no argument that the Contract Clause does not constrain the power of the States to modify remedies as well as the substantive or procedural law of contracts. *See W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935).

business through literally thousands of contracts, and its calculation of premiums, reserves and other business risks are based upon its understanding of the general range of exposure it assumes under each of these contracts and the actuarial likelihood of claims under each contract. Adding a whole new spectrum of contingent liabilities with unanticipated financial consequences, as this Court has recognized, strikes at the very stability of contract which the Contract Clause protects:

> "These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect."

Los Angeles Dept. of Water & Power v. *Manhart*, 435 U.S. 702, 721 (1978), *as quoted in Allied Structural Steel Co.* v. *Spannaus*, 438 U.S., at 246-47.[13]

Measured against the severe disruption of appellant's settled contractual expectations manifested in the decision below is the interest of Alabama in exacting $3,500,000 from appellant and transferring that sum to appellees. For reasons discussed fully in part V B of this brief, Alabama's interest in exacting such a penalty through this tort action is of little or no weight even in the context of *prospective* application of that tort to

---

[13]Under the contract at issue, the premium rates are increased or reduced as "warranted by experience or by reason of any change in factors bearing on the risk assumed." (J.A. 43). It is obvious that a new tort accompanied with potentially large liabilities at an uncertain time in the future would be difficult enough to factor into an experience rating system. To do so retrospectively is, of course, impossible, illustrating the need for, and efficacy of, the Contract Clause.

insurance companies. It follows *a fortiori* that Alabama has no legitimate interest in imposing this exorbitant punitive damage award retrospectively on a party for breach of a contract which was executed and performed years earlier. Indeed, it is difficult to imagine a case in which the retrospective application of a new obligation on a contractual relationship would better fit this Court's language in *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935), that an impairment of contract might be "without moderation or reason or in a spirit of oppression."

V

THE $3,500,000 PUNITIVE DAMAGE AWARD VIOLATES APPELLANT'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

If appellees ultimately prevail in this case, they will receive a windfall which exceeds their actual damages by an amount which would reimburse those damages two thousand times over. They will receive this massive bounty not because the legislature of Alabama has determined that such rewards serve some legitimate state purpose. In fact, the Alabama legislature determined in 1981 that a wronged claimant should receive "one and one-half percent per month on the amount of said claim until it is finally settled or adjudicated." § 27-1-17(b), *Code of Alabama* (1975) (App. 2a, *infra*). This would mean approximately $2,400 if calculated from June 3, 1977, the date the Lavoie claim was first declined, to the present. The Alabama courts have added another $3,497,600.

This punitive damage award cannot be reconciled with the concepts of fairness, rationality and proportionality that have been imposed on the States under either the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment.

A. The Excessive Fines Clause of the Eighth Amendment Should Be Held To Apply to Punitive Damage Awards in Civil Cases

The Eighth Amendment expressly prohibits excessive fines. Remarkably, this Court has never had occasion to construe that provision. Under traditional analysis, therefore, the determination whether the Excessive Fines Clause applies to control the punitive damage award in this case requires an examination of the origins of the Eighth Amendment and the contemporary construction of the Cruel and Unusual Punishments Clause component of that Amendment by this Court.

However, before commencing that examination it is important to recognize an important aspect of the punitive damage award here which is beyond dispute and which frames the Excessive Fines Clause inquiry.

The purpose of the imposition of this $3,500,000 award against appellant was articulated by the court below in terms that could not have more succinctly expressed the classic purposes of criminal punishment:

> "The purpose behind the imposition of punitive damages is twofold: (1) to punish the defendant for his oppressive, willful acts *and* (2) to warn or deter others . . . from equally reprehensible conduct."

(J.S. App. 34a).[14] This characterization below of the purposes of this punitive damage award pretermits the need for the kind of searching inquiry into the intent behind the authorization for a particular fine or punishment that has normally accompanied this Court's decisions applying constitutional provisions such as the Bill of Attainder Clause to cases involving neither a criminal trial as such nor incarceration.[15]

---

[14] "If the statute imposes a disability for the purposes of punishment — that is, to reprimand the wrongdoer, to deter others, etc. — it has been considered penal." *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (Warren, C.J.) (plurality opinion).

[15] *E.g.*, *United States* v. *Lovett*, 328 U.S. 303 (1946).

Furthermore, there is no disagreement in this Court with the proposition that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J., dissenting). If the imposition of a large fine in order to punish and deter others is not sufficiently analogous to a criminal punishment for the Eighth Amendment to apply, serious doubt would be cast on the continuing vitality of cases such as *Trop* v. *Dulles*, 356 U.S. 86 (1958), and *In re Gault*, 387 U.S. 1 (1967), which have been cited by this Court as examples of punishment administered in non-criminal proceedings to which the Eighth Amendment is applicable. *Ingraham* v. *Wright*, 430 U.S., at 669 n.37 & 671-72 n.40.

1. *The relevant history of the Excessive Fines Clause and its English antecedents requires the application of that Clause to punitive damage awards in civil actions*

This Court has only recently reexamined the history of the Eighth Amendment and reaffirmed the pertinence of the English experience to questions arising under that Amendment, *Solem* v. *Helm*, 463 U.S. 277, 284-86 (1983); *Ingraham* v. *Wright*, 430 U.S., at 664-66. Appellant will therefore restrict its commentary on the background of that Amendment to the question whether the Excessive Fines Clause was intended by its Framers to apply only to a fine or penalty imposed in a criminal proceeding.

This Court has, of course, clearly understood and applied the Cruel and Unusual Punishments Clause — which is more obviously associated with punishments imposed after criminal proceedings than is the Excessive Fines Clause — to reach certain types of punishment which have not been imposed in criminal proceedings. *E.g.*, *Trop* v. *Dulles*, *supra*. The same rationale should apply, for even more persuasive reasons, to the Excessive Fines Clause.

It is noteworthy that the brief debate on the Excessive Fines Clause in the First Congress, 1 Annals of Cong. 782-83 (Gales & Seaton eds. 1834), immediately followed the debate in the House over the proposed Fifth Amendment. *Id.*, at 781-82. Because the Fifth Amendment contained clauses that could have been thought to apply outside the context of criminal proceedings, such as the Self-incrimination Clause, Representative Lawrence proposed, and the House adopted, language to confine that Clause "to criminal cases." *Id.*, at 782. If the Framers of the Eighth Amendment had intended that its Clauses not be applied outside the context of criminal proceedings, a similar amendment presumably would have been proposed. Thus, absent a persuasive reason to believe that the Framers believed the word "fines" to encompass only monetary penalties assessed in criminal proceedings, and there is none, the presumption is against such a narrow reading of the word "fines."

An analysis of the English experience, similar to that undertaken in *Solem* and *Wright*, is also relevant to the application of the Excessive Fines Clause to punitive damage awards in a fashion not drawn out, for obvious reasons, in *Solem* and *Wright*. This experience convincingly demonstrates that the sources of our Eighth Amendment — Magna Carta and the English Bill of Rights — would have applied the principles embodied in the Excessive Fines Clause directly to control punitive damage awards.

Punitive damages under English common (and statutory) law originated in the same type of civil actions which were covered by the "excessive amercement" provision of Magna Carta.[16] Pollock and Maitland, in their general discussion of offenses punishable by amercement or imprisonment in 13th-century England, set out the origins of "penal and exemplary damages" as follows:

---

[16]Ch. 20 of Magna Carta declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." *See* 1 S.D. Codified Laws 4 (1978) (translation of Magna Carta), *as quoted in Solem* v. *Helm*, 463 U.S., at 284 n.9.

> "[U]nder Edward I, a favourite device of our legislators is that of giving double or treble damages to 'the party grieved.' They have little faith in 'communal accusation' or in any procedure that expects either royal officials or people in general to be active in bringing malefactors to justice. More was to be hoped for the man who had suffered . . . . And so in a characteristically English fashion punishment was to be inflicted in the course of civil actions: it took the form of manyfold reparation, of penal and exemplary damages."

2 F. Pollock & F. Maitland, *The History of English Law* 522 (2d ed. 1909). This observation by Pollock and Maitland, directly tying the English concept of "punishment" to the award of "penal and exemplary damages," is placed in its broader context earlier in that same discussion as follows:

> "*Offences punished in the course of civil actions.* Every tort, nay, every cause of civil action, was a punishable offence. Every vanquished defendant, even though the action was 'real' or was contractual, had earned punishment. At the least he had been guilty of an unjust detention . . . . In the lower courts he could only be — but he would be — amerced."

Id., at 519.

As this Court many centuries later observed, "An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th-century England. *See* 2 F. Pollock & F. Maitland, The *History of English Law* 513-515 (2d ed. 1909)." *Solem* v. *Helm*, 463 U.S., at 284 n.8. There can be no doubt that the double or treble damages awarded as punitive damages were regarded as an amercement under the earliest relevant English law and were therefore presumptively controlled by the "excessive amercement" provision of Magna Carta. As this Court observed in *Solem* v. *Helm*, "These were not hollow guarantees, for the royal courts relied

on them to invalidate disproportionate punishments." 463 U.S., at 285.[17]

In 1689, the English Bill of Rights incorporated the "excessive amercement" principle of Magna Carta and applied that principle to "excessive Baile . . . excessive Fines [and] cruell and unusuall Punishments." 1 Wm. & Mary, Sess. 2, Ch. 2 (1689). That provision was, in turn, incorporated into Art. I, § 9 of the Virginia Declaration of Rights (1776), and thence into the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10. The result of this chain of events dating back to the earliest punitive damage awards and to Magna Carta is clear:

> "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection — including the right to be free from excessive punishments."

Id., at 286. Thus, the punitive damage award in this case is of the same character as the remedies which were intended to be limited by the linear antecedents of the Eighth Amendment.

Finally, although punitive damages as awarded in this case are a relatively recent development in American jurisprudence, there is very little doubt that Blackstone would have regarded such damages as falling within the English common law definition of "fine." In Volume 3 of his *Commentaries*, dealing with "Private Wrongs," Blackstone identifies no less than six instances in which civil actions for damages were maintained by private persons where, if the plaintiff prevailed, the defendant was required to pay a fine to the Crown. 3 W. Blackstone, *Commentaries on the Law of England* *118,

---

[17]The case relied upon by the Court to support this proposition, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), upheld the claim of Richard Le Gras that an amercement of one mark against him for his improper essoin in a civil case was excessive and therefore in violation of Magna Carta.

*138, *179, *188, *398, *402 (1768). Here, of course, the punitive damage award is made to the appellees, not the State of Alabama. But, as Justice Rehnquist observed in *Smith* v. *Wade*, the purposes of punitive damages are not to right any wrong done to the plaintiff; indeed, Justice Rehnquist noted that, in theory, punitive damages should be paid to the State, not the plaintiff. 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). *See also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (punitive damages "are private *fines* levied by civil juries" (emphasis added)).

2. *The $3,500,000 punitive damage award in this case is excessive*

In *Solem* v. *Helm*, this Court was presented with two substantial difficulties in applying the Eighth Amendment which are not present here. First, four Justices squarely rejected the holding that the Cruel and Unusual Punishments Clause incorporated the concept of proportionality as held by the majority. *See Solem* v. *Helm*, 463 U.S., at 312-15 (Burger, C.J., dissenting). If, however, the Excessive Fines Clause is applicable to the punitive damage award in this case, then it seems indisputable that the appropriate inquiry regarding excessiveness must be an inquiry into proportionality.

Second, an inquiry into proportionality in the context of punitive damages awarded under a judicially created cause of action, as here, does not involve an intrusion by this Court into that delicate balance of federalism which moved the dissenters in *Solem* to observe that the proportionality review there was "nothing other than a bald substitution of individual subjective moral values for those of the legislature." *Id.*, at 314. Indeed, the excessiveness of the award here is dramatized by the staggering difference between it and the amount determined to be appropriate under the formula adopted by the Alabama legislature in 1981 in § 27-1-17.

Determining whether the award in this case is disproportionate and therefore excessive is not complicated. Appellant was found by a jury wrongfully to have refused to pay a claim of $1,650.22. The only available measure of propor-

tionality is to compare those contract damages with the $3,500,000 punitive damage award. The ratio is about the same as four hours bears to one year. A bar graph showing the punitive damage award as the height of this page would have a small, virtually invisible speck (seven one-hundredths of one sixteenth of an inch) on the bottom of the page to represent the actual damages.

Other legislative value judgments made by the Alabama legislature demonstrate the grossly disproportionate relationship between the contract damages in this case and the $3,500,000 punishment inflicted on appellant. If appellant's conduct in this case had been punishable as a business fraud under Alabama's *criminal* statutes on that general subject, appellant not only would have been entitled to the full panoply of federal constitutional protections available to those exposed to criminal punishment in criminal proceedings—protections not extended to appellant—but, if found guilty, could have anticipated a monetary penalty of $3,000. *See* §§ 13A-4-3, 13A-5-12 and 13A-9-41 *et seq.*, *Code of Alabama* (1975).[18]

Comparisons between the punishment in the case at bar with other statutory schemes yield essentially the same result. For example, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, a private plaintiff is authorized to bring a civil action, § 1964, under which treble damages (plus attorneys' fees) may be recovered if the defendant can be shown, *inter alia*, to have engaged in "racketeering" activity. § 1961(1). As four Justices of this Court expressly observed only last Term, RICO places defendants in the position of "facing a tremendous financial exposure [producing] a strong interest in settling the dispute." *Sedima, S.P.R.L.* v. *Imrex Co.*, Nos. 84-648 & 84-822, slip op., at 4-5, 53 U.S.L.W. 5034, 5041 (July 1, 1985) (Marshall, J., dissenting). Yet this "tremendous financial exposure" pales by comparison to the

---

[18]It is noteworthy that the penalties under either Alabama's business fraud provisions or under § 27-1-17 would be roughly the same as the double-to-treble "exemplary" damages originally awarded in English cases based upon legislative initiative. *See* 2 F. Pollock & F. Maitland, *The History of English Law* 522 (2d ed. 1909).

exposure to which appellant and other insurers are subjected on a daily basis in Alabama. If appellant had violated RICO and caused the same amount of damages as in this case, its penalty would have been 700 times smaller under the remedy adopted by Congress than the remedy created and approved in this case by the Supreme Court of Alabama.

Appellant has demonstrated that the Excessive Fines Clause was intended to and does apply to punitive damages imposed in civil litigation. The excessiveness of the fine in this case is surely incontestible.

B. The $3,500,000 Punitive Damage Award Violates Appellant's Rights Under the Due Process Clause

Punitive damages, by definition, transfer from one litigant to another a monetary recovery "in excess of . . . actual loss." *Scott* v. *Donald*, 165 U.S. 58, 86 (1897). Under the Due Process Clause, property rights may be affected, or a person punished, only after Due Process has been observed. *Ingraham* v. *Wright*, 430 U.S., at 672. Appellant submits that the imposition of punitive damages in this case violates the Due Process Clause because it confiscates a large amount of appellant's property and transforms it into an extraordinary monetary windfall to appellees. The occasion for doing so is punishment for acting inconsistently with a substantive rule of conduct that was nonexistent in Alabama when the acts of which appellees complained took place.

Punitive damages are, almost by definition, arbitrary, capricious, severe and whimsical. It is therefore not surprising that various members of this Court have expressed significant concern regarding their place in a culture which places a high premium on due process of law. For example, in *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979), Justice Marshall, writing for himself and Justices Brennan, Stewart, White and Powell, pointed out that, "Because juries are accorded broad discretion as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial." And Justice Marshall went on to state another danger of punitive damages — that

they "may be employed to punish unpopular defendants." *Id*, at 50-51 n.14.[19]

In *Smith* v. *Wade*, Justice Rehnquist, writing for himself, the Chief Justice and Justice Powell, pointed out that punitive damages are generally rationalized on three grounds. First, they "'are assessed for the avowed purpose of visiting a *punishment* upon the defendant.'" 461 U.S., at 58, *quoting* C. McCormick, *Law of Damages* 275 (1935) (emphasis added by Rehnquist, J.), but such a punitive fine — if it should be imposed in a *civil* trial at all — "should go to the State, not to the plaintiff — who by hypothesis is fully compensated." *Id.*, at 59.

Second, Justice Rehnquist observed that punitive damages are justified as deterring "persons from violating the rights of others." *Id.*, at 58. Where a known rule of conduct is violated, as was the situation in *Smith* v. *Wade* itself, the "deterrence" rationale perhaps would provide some arguably rational basis for a State's authorizing the recovery of a reasonable amount of punitive damages by a private person. But where, as here, no cause of action for bad faith failure to pay an insurance claim existed until almost fourteen years after execution and four years after performance under the contract — much less a set of rules accompanying that cause of action to which appellant might have looked for guidance — it is plainly irrational to suggest that the retrospective application of new rules to historic conduct could have any deterrent effect.

Finally, Justice Rehnquist observed that punitive damages had been "justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights." *Id.* It is, however, inconceivable that Alabama's interest in encouraging bounty hunters to sue those with whom they have contracted bears any rational relationship to the $3,500,000 award in this case.

---

[19]Justice Marshall's statement in this regard made reference to hostility of jurors towards unions or management. As illustrated by the attitude of Justice Embry discussed *supra*, hostility of this nature is not limited to jurors or to unions and management.

As Justice Brennan, writing in dissent and joined by Justices Marshall, Blackmun and Stevens only last Term indicated, the Court's cases have "recognize[d] that 'the alleged deterrence achieved by the punitive damage awards is likely to be outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined.'" *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-13, slip op., at 6 n.4, 53 U.S.L.W. 4866, 4874 n.4 (June 26, 1985) (Brennan, J., dissenting), *quoting Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting).[20]

Appellant submits that the Due Process Clause prohibits the imposition of *any* punitive damages in the context of the performance of contractual obligations in the absence of any fair warning that such damages might be imposed, in the absence of any articulated substantive rule of conduct which, by following, a party to a contract can avoid such liability, and in the absence of any state interest sufficient to outweigh the irrational impact on businesses such as the insurance business which, as argued above and as previously observed by this Court, depend greatly upon stability in their contractual relationships. And, as this Court has made abundantly clear, the restrospective application of such liability has "to meet a burden not faced by [measures] that ha[ve] only future effects." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, ____ U.S. ____, ____, 104 S.Ct. 2709, 2718 (1984). Here, the retro-

---

[20]The court below has apparently abandoned any pretense of controlling the size of punitive damage awards. *See American Pioneer Life Ins. Co.* v. *Sandlin*, No. 82-1603, slip op., at 21 (Ala. Apr. 12, 1985) (Maddox, J., concurring specially).

spective imposition of this new tort and its accompanying liability for punitive damages is both "harsh and oppressive," *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981), and is therefore violative of the Due Process Clause because it advances no legitimate state interest. Instead, it is focused, well after the fact, on the "blameworthiness" of appellant, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976), and on achieving some kind of "deterrence," *id.*, at 17 — precisely the two objectives identified by this Court as least likely to sustain the retrospective imposition of civil liability. *Id.*

These fundamental defects in the process afforded to appellant in this case must also be considered in the context of the fact that this punitive damage award was imposed in a civil action "unaccompanied by the types of safeguards present in criminal proceedings." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting). At the very least, this absence of safeguards strongly supports this Court's applying the Excessive Fines Clause, or the Due Process Clause *ex proprio vigore*, to control the imposition of punitive damage awards. Failure of this Court to do so would, appellant submits, be contrary to the thrust of this Court's cases which have already placed limits on the power of the government to impose punishment on persons in civil litigation. *See, e.g., United States* v. *Ward*, 448 U.S. 242, 248-51 (1980) *and cases cited.* These limitations, particularly as they would affect the size of punitive damage awards, would preserve the constitutional rights of litigants while at the same time permitting the States appropriate leeway to ensure adequate compensation for wrongs committed within their respective jurisdictions. *Cf. Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18, slip op., at 7, 53 U.S.L.W., at 4872 (White, J., concurring in the judgment).

CONCLUSION

The Aetna Life Insurance Company's experience with the laws and the courts of Alabama reflects a drastic departure from constitutional standards. For conduct which violated no law, it has been punished in an amount vastly in excess of any penalty which would have been imposed under any penal code analog. The process by which that penalty was inflicted was devoid of the protections the Constitution requires as minimal standards for those accused of crime but exposed to less oppressive punishments. Its carefully negotiated contractual expectations have been uprooted. It has been penalized arbitrarily for resorting to the Alabama appeal process. It has been denied a fair hearing in a fair tribunal.

The judgment below should be set aside and the matter remanded to the Alabama courts for the entry of a judgment not in excess of the compensatory damages awarded by the jury in this case.

Respectfully submitted,

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Of Counsel:

PETER V. SINTZ
WILLIAM M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

Attorneys for Appellant
**Counsel of Record*

August 2, 1985

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Contract Clause, Art I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

3. The Excessive Fines Clause of the Eighth Amendment of the Constitution, provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

4. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

5. Section 12-22-72, *Code of Alabama* (1975), provides in pertinent part, that:

> "When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . ."

6. Section 27-1-17, *Code of Alabama* (1975), provides:

> "Limitation period for payment of claims under health and accident insurance policies; payment of interest; right of action for recovery of unpaid benefits.

"(a) All persons, firms, corporations or associations issuing health and accident insurance policies within this state shall consider claims made thereunder and, if found to be valid and proper, shall pay such claims within 45 days after the receipt of proof of loss under such policies. Benefits due under the policies and claims are to be considered overdue if not paid within 45 days after the insurer receives reasonable proof of the fact and amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof shall be considered overdue if not paid within 45 days after such proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof shall be considered overdue if not paid within 45 days after such proof is received by the insurer. For the purposes of calculating the extent to which any benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail to the last known address of the claimant or beneficiary in a properly addressed, postpaid, envelope, or, if not so posted, on the date of delivery.

"(b) If the claim is not denied for valid and proper reasons by the end of said 45 day period, the insurer must pay the insured one and one-half percent per month on the amount of said claim until it is finally settled or adjudicated.

"(c) In the event that the insurer fails to pay such benefits when due, the person entitled to such benefits may bring an action to recover them."

CASE ACTION SUMMARY
—CIVIL—

State of Alabama
Unified Judicial System

IN THE CHANCERY COURT
OF JEFFERSON COUNTY

Case Number CV 84 500-447 JDC

Amount 57.00

Date Filed 1/30/84

T. ERIC EMBRY,

Plaintiff(s),

V.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Defendant(s).

DATE	ACTIONS, JUDGMENTS, CASE NOTES
1-30-84	Comp. Seeking Declaratory Judgment
1-31-84	Sum. & Comp. iss'd.
2-2-84	Ex (2/3)
3-2-84	Mot. to Dismiss & Notice (SBA) (3/5)
4-11-84	Order of Continuance (Joe) (4/16)
5-31-84	Order (JDC) (6/7)
10-2-84	Notice of Depo. (SBA) (10/3)
11-14-84	Motion to Compel & Notice (SBA) (11/15)
11-19-84	Order (JDC) (11/26)
11-21-84	P's Mot. to Certify this Action as a class action (SBA) (11/26)
11-21-84	Notice of Hearing (11/26)

12-7-84	D's Answer to P's Interr. (SBA) (12/10)
12-12-84	Response to P's Request for Production (SBA) (12/13)
12-13-84	Motion to Compel (SBA) (12/14)
12-13-84	Motion of Hearing (12/14)
12-17-84	Notice of Depo (SBA) (12/18)
12-19-84	Depo of E. Gene Thrasher (12/20)
12-20-84	Order on Motion to Compel (JDC) (12/26)
12-21-84	Memorandum of Plaintiff (SBA) (12/26)
1-4-85	P's Motion for a Protective Order & Notice (SBA) (1/7)
1-7-85	D's Supplemental Answers to P's Interr. (SBA) (1/10)
1-7-85	Motion for Protective Order & Notice (SBA) (1/10)
1-9-85	Order (JDC) (1/10)
1-9-85	Order Re: Class Certification Hearing (JDC) (1/10)
1-14-85	Order of Continuance (JDC) (1/16)
3-20-85	Depo of T. Eric Embry (3/27)
4-9-85	Notice of Depo (SBA) (4/10)
4-16-85	Stipulation for Dismissal (4/18)
4-16-85	Order of Dismissal (JDC) (4/18)